Medical law reporter

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THE HIGH COURT'S LOST CHANCE IN MEDICAL NEGLIGENCE: TABET v GETT (2010) 240 CLR 537

In 2010 the High Court of Australia in Tabet v Gett (2010) 240 CLR 537 determined an appeal in a medical negligence case concerning a six-year-old girl who had presented to a major paediatric hospital with symptoms over several weeks of headaches and vomiting after a recent history of chicken pox. The differential diagnosis was varicella, meningitis or encephalitis and two days later, after she deteriorated neurologically, she received a lumbar puncture. Three days later she suffered a seizure and irreversible brain damage. A CT scan performed at that point showed a brain tumour. As Australia does not have a no-fault system providing compensation to cover the long-term care required for such a condition, the girl (through her parents and lawyers) sued her treating physician. She alleged that, because a cerebral CT scan was not performed when clinically indicated after the diagnosis of meningitis or encephalitis and before the lumbar puncture, she had "lost the chance" to have her brain tumour treated before she sustained permanent brain damage. She succeeded at first instance, but lost on appeal. The High Court also rejected her claim, holding unanimously that there were no policy reasons to allow recovery of damages based on possible (less than 50%) "loss of a chance" of a better medical outcome. The court held that the law of torts in Australia required "all or nothing" proof that physical injury was caused or contributed to by a negligent party. The High Court, however, did not exclude loss of chance as forming the substance of a probable (greater than 50%) claim in medical negligence in some future case. In the meantime, patients injured in Australia as a result of possible medical negligence (particularly in the intractable difficult instances of late diagnosis) must face the injustice of the significant day-to-day care needs of victims being carried by family members and the taxpayer-funded public hospital system. The High Court in Tabet v Gett again provides evidence that, as currently constituted, it remains deaf to the injustice caused by State legislation excessively restricting the access to reasonable compensation by victims of medical negligence.

INTRODUCTION

As the law of negligence has evolved in Australia, "loss of chance" has taken on a particular character in medical negligence cases. In addition to its place in the quantification of damages, the concept has been relied upon either as a cause of action, or as a specific type of harm. In "loss of a chance" cases, the plaintiff "in effect redefines his or her physical loss (as a matter of pleading) as the chance of avoiding a physical loss or the chance of obtaining a better physical outcome".[1] As a result of State legislation severely constricting the capacity of injured patients to receive reasonable compensation through tortious litigation, the concept was also a means of bringing greater equity into a fundamentally unjust system.

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[1] Sullivan A, "Loss of a Chance of a Better Outcome – Legal Considerations", Medico-Legal Society of NSW Inc Scientific Meeting, November 2009.

According to Gummow ACJ in *Tabet v Gett* (2010) 240 CLR 537 (at [24]), this expansion has been driven largely by "a tendency to run together questions of attribution of liability and the measure of damages recoverable". The result has been confusion regarding the state of the Australian common law as regards the loss of chance doctrine. The reality, however, may be that such technical legal claims are being forced upon plaintiffs in medical negligence cases in Australia because of comparatively recent tort law statutory changes making successful claims extremely difficult and the absence of a no-fault compensation scheme for medically-related injuries.

Over the past decade, Australian medical negligence law has undergone substantial legislative change which has been criticised as unjust in previous editions of this column. In this revised framework, the definition of harm does not include "loss of chance" or risk of injury in the definition of "harm".[2] It was to this challenge, this chance of righting a profound wrong, that the High Court turned its attention in *Tabet v Gett*.

EVENTS LEADING TO THE LITIGATION

The appellant, Reema Tabet, was six years of age when she presented to the Royal Alexandra Hospital for Children in Sydney on 11 January 1991. Her parents gave her recent history of chickenpox as well as headaches and vomiting for several weeks before as well as after that illness. The respondent, Dr Maurice Gett, a paediatrician at the hospital, made a provisional diagnosis of chickenpox, meningitis or encephalitis and Reema was admitted under his care as a public patient (at [4]). On 13 January at 11 am, nursing staff noticed that her pupils were unequal and that the right pupil was fixed and dilated. Clinically, this is usually taken as a critical clinical sign that raised intracranial pressure is compressing the optic nerve and that if that pressure is not relieved the patient's brain stem may herniate into the spinal column, causing death. In such a situation, a lumbar puncture may allow microscopy, culture and antimicrobial sensitivities, but with the immediate attendant risk of herniation of the brain stem into the spinal cord. For this reason, it is the clinical standard of care for a cerebral CT scan to be performed before such a lumbar puncture to determine the degree of cerebal swelling and – by extrapolation – cerebral pressure elevation.

The following day Reema suffered a seizure. At that point a cerebral CT scan and electroencephalography (EEG) were ordered. She was diagnosed to be suffering from a brain tumour. She received treatment, including an operation to remove the tumour. She suffered irreversible brain damage, partly as a result of the events on 14 January 1991, partly from the tumour (which had been growing for over two years), and partly from the operative procedure and other treatment (not said to be in any way negligently performed). The central allegation was that the cerebral CT scan that was undertaken on 14 January should have been performed earlier, either on 11 or 13 January, and that if it had, treatments would have been available (intravenous corticosteroids and/or the insertion of a drain into a cerebral ventricle) to reduce the intracranial pressure and so limit the risk of brain damage before the tumour was surgically removed.[3]

HISTORY OF THE PROCEEDINGS

In her action against Dr Gett, the appellant (through her tutor and uncle Ghassan Sheiban) alleged two causes of action:

1. the respondent breached his duty to manage her with due care and skill and this caused or contributed to cause her injury, loss and damage, or,
2. the respondent's breach of duty led to "the loss of an opportunity to avoid injury, loss and damage".

[2] For example, *Civil Liability Act 2002* (NSW), s 5; and *Civil Liability Act 2003* (Qld).

[3] *Tabet v Gett* (2010) 240 CLR 537 (at [5]), Gummow ACJ quoting *Gett v Tabet* (2009) 254 ALR 504 at 506-507 (Allsop P, Beazley and Basten JJA).

The case failed at first instance on the first ground.[4] Studdert J held the respondent had breached his duty of care by not ordering a CT scan on 13 January 1991.[5] Studdert J, however, was

> not persuaded, on the balance of probabilities, that if the respondent had ordered a CT scan on 13 January and the appellant was treated upon the discovery of the tumour, such brain damage as occurred on 14 January would have been avoided. [The appellant's] claim that such damage was caused by the respondent therefore failed.[6]

The appellant's case on the second cause of action was that the respondent's negligence deprived her of a chance, prospect or opportunity that had remained open only for a short period between her hospital admission or the manifestation of the clinical sign of raised intracranial pressure at 11 am on 13 January and her seizure and deterioration on 14 January. The chance she claimed was that of avoiding 25% of the eventual outcome.[7] This claim was successful at first instance.

Studdert J found that, with a provisional diagnosis of meningitis or encephalitis (where the risk of raised intracranial pressure is high), once clinical signs of its existence became manifest, a cerebral CT scan should have been performed and the intracranial pressure on the brain should have been relieved as soon as possible. Based on the evidence presented, two possible treatments were available: the administration of corticosteroids or the insertion of an intraventricular drain.[8] Studdert J found that it was "more likely that steroids would have been prescribed rather than the placement of a drain" and considered that corticosteroids would have had "some beneficial effect".[9] His Honour found that the appellant "lost a chance of a better medical outcome had the brain tumour been detected on 13 January 1991, as it would have been if the CT scan had been performed that day".[10]

In coming to this conclusion, the trial judge was faced with the question as to whether the common law of negligence in Australia recognised

> a less than even chance of avoiding an adverse health outcome as an interest of value to a patient, the loss of which by reason of a doctor's negligence, can be compensated as damage suffered by that patient?[11]

His Honour was required to consider this question in the light of Australian common law as rhe material events had occurred before the enactment of the controversial *Civil Liability Act 2002* (NSW).[12] In supporting a claim for damages for loss of a chance, Studdert J relied on the decisions of the Victorian Court of Appeal in *Gavalas v Singh* (2001) 3 VR 404 and the New South Wales Court of Appeal in *Rufo v Hosking* (2004) 61 NSWLR 678.

Having made this finding, Studdert J assessed the damage referable to the deterioration on 14 January as 25% of her ultimate disabilities and that the loss of chance of a better outcome was 40% of this 25%. Based on these percentages, the appellant was awarded A$610,000 in damages.[13]

The Court of Appeal allowed Dr Gett's appeal.[14] It found that the appellant failed to demonstrate that she had suffered more than the loss of the opportunity of a better outcome. She had also failed to

[4] *Tabet v Gett* (2010) 240 CLR 537 at [2] (Gummow ACJ).

[5] *Tabet v Mansour* [2007] NSWSC 36.

[6] *Tabet v Gett* (2010) 240 CLR 537 at [106] (Keifel J).

[7] *Tabet v Gett* (2010) 240 CLR 537 at [29] (Gummow ACJ).

[8] *Tabet v Gett* (2010) 240 CLR 537 at [115] (Keifel J).

[9] *Tabet v Gett* (2010) 240 CLR 537 at [115], Keifel J quoting *Tabet v Mansour* [2007] NSWSC 36 at [378] (Studdert J).

[10] *Tabet v Gett* (2010) 240 CLR 537 at [7], Gummow ACJ quoting *Gett v Tabet* (2009) 254 ALR 504 at 507.

[11] *Tabet v Gett* (2010) 240 CLR 537 at [71], Heydon J citing *Gett v Tabet* (2009) 254 ALR 504 at 507.

[12] *Tabet v Gett* (2010) 240 CLR 537 at [2] (Gummow ACJ).

[13] *Tabet v Gett* (2010) 240 CLR 537 at [9], Gummow ACJ referring to *Gett v Tabet* (2009) 254 ALR 504 at 507.

[14] *Tabet v Gett* (2010) 240 CLR 537 at [107] (Kiefel J).

show that the trial judge should have found, on the balance of probabilities, that the respondent's negligence caused 25% of her overall disability after the operation.[15]

In the Court of Appeal's view, to permit recovery for the claim for the loss of the chance would revolutionise proof of causation of injury in medical negligence.[16] In coming to this conclusion, the Court of Appeal held that the loss of chance analysis adopted in *Rufo v Hosking* (2004) 61 NSWLR 678 (and *Gavalas v Singh* (2001) 3 VR 404) (supporting recovery where less that an even chance of avoiding the adverse outcome was involved) "departed from conventional principles" and was "plainly wrong".[17]

THE HIGH COURT APPEAL

On appeal to the High Court in *Tabet v Gett* (2010) 240 CLR 537, the appellant submitted that the Court of Appeal erred in holding that the causal effects of the respondent's negligence should be assessed on the balance of probabilities and that the approach taken by the trial judge "on the basis of loss of a chance of a better outcome" was correct (at [11], Gummow ACJ).

The appellant alleged there were two central issues of law:

- whether in a claim arising from personal injury the law of negligence permits the bifurcation of the nature of the actionable damage attributable to the same breach of duty, so that failure of the case on the first branch may be overcome by success on the second; and
- whether the evidence sufficiently supported the favourable finding at trial on the claim for loss of opportunity (at [3], Gummow ACJ).

The respondent doctor's case was that the evidence provided an insufficient basis for a favourable outcome based on anything more than speculation. The respondent also submitted that the "chance" found was inevitably indeterminate: "that steroids if administered, or an intraventricular drain if inserted earlier, would have worked to lessen or prevent brain damage". Counsel for the respondent also submitted that there was no expert evidence as to the value of the lost chance or sufficiently identifying the actual harm suffered on 14 January 1991 (at [32], Gummow ACJ).

The High Court affirmed the decision of the Court of Appeal and unanimously dismissed the appellant's claim.

Gummow ACJ: Differences between recovery in contract and tort

Gummow ACJ held that the appellant's case failed on two grounds. The first was the rejection of the proposition that in personal injury cases the common law of Australia entertains action for recovery when the damage is characterised as the loss of a chance of a better outcome of the character found by the trial judge in this case (at [46]). The second reason was that the evidence presented at trial provided a basis for no more than speculation as to the loss of a chance of a better outcome whether assessed at 40% or (as the Court of Appeal had assessed) 15% (at [45], Gummow ACJ).

Gummow ACJ held that the law of torts should not be reformulated to "permit recovery for physical injury not shown to be caused or contributed to by a negligent party, but which negligence has deprived the victim of the possibility (but not the probability) of a better outcome" (at [25]).[18] He qualified this by noting (at [27]):

> [T]his outcome will not require acceptance in absolute terms of a general proposition that destruction of the chance of obtaining a benefit or avoiding a harm can never be regarded as supplying that damage which is the gist of an action in negligence.

Further, if the likelihood of a better outcome had been found to be greater than 50%, then on the balance of probabilities the appellant would have succeeded on the main branch of her case in negligence (at [31]).

[15] *Tabet v Gett* (2010) 240 CLR 537 at [12] (Gummow ACJ).

[16] *Gett v Tabet* (2009) 254 ALR 504 at 586.

[17] *Gett v Tabet* (2009) 254 ALR 504 at 587.

[18] Gummow ACJ, referring to *Gett v Tabet* (2009) 254 ALR 504 at 586.

In this respect, Gummow ACJ discussed fundamental differences between the law of contract and of torts. In contract law, action for breach of contract lies upon the occurrence of breach. In negligence, an action lies only if and when damage can be proven to have been sustained. The relevant importance of this difference for negligence cases was identified by Brennan J in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 359. Unlike an action in contract, "the existence and causation of compensable loss in negligence cannot be established by reference to breach of an antecedent promise to afford an opportunity" (at [47]). Gummow ACJ explained (at [50]):

> [I]n an action in tort, where damage is the gist of the action, the issue which precedes any assessment of damages recoverable is whether a lost opportunity, as a matter of law, answers the description of "loss or damage" which is then compensable.[19]

A point of potential confusion arises from the fact that, in the tort of negligence, harm to the interests of the plaintiff which is not sustained by injury to person or property, in the ordinary sense of those terms, may qualify in at least some cases as the compensable damage consequent upon a breach of a duty of care. In some negligence cases, recovery for "economic loss" has been permitted on this basis.[20] However, his Honour noted (at [46]) that this avenue of recovery does not indicate that the principles of law applied in recovery of damages for breach of contract offer an appropriate analogy to those in personal injury cases. As the Court of Appeal outlined, to reformulate the law of torts in this way would involve

> reference to an assessment of increased risk of harm, verbally reformulated into loss of a chance or opportunity in order to equate it with the recognition in *Sellars v Adelaide Petroleum NL* and like cases of the existence in commerce of a coherent notion of loss of a right or chance of financial benefit … In our view, its limits (unless expanded by the High Court) must fall short of a proposition which revolutionises the proof of causation of injury or [which redefines what is "harm"] in personal injury cases.[21]

Having made the distinction between the principles applying in contract as opposed to torts law, Gummow ACJ noted (at [21]) that if recovery were to be sought or permitted for a decrease in a patient's prospects of recovery, rather than the outcome, the diminished prospect has to be identified and valued. This does not mean that, once an interest of value is identified, issues of causation do not arise. His Honour added (at [29]):

> [T]here may be the view that substituting loss of chance as an actionable damage assists the maintenance of health care practice standards where there is a less than even chance of cure … but this has to be weighed against, for example, the prospect of defensive medicine.

Heydon J: Discovery of fixed, dilated pupil not critical

Heydon J reviewed the two clinical management scenarios considered by Studdert J as providing the potential to lessen the adverse outcome. His Honour identified the crucial question as whether the chance of an occurrence of brain damage at 11.45 am on 14 January could have been reduced if the defendant had arranged for a CT scan after the discovery of the fixed, dilated pupil at 11 am on 13 January (at [75]).

In relation to the insertion of a drain, Heydon J identified two alternative factual bases for loss of chance (at [84]). First, there was the possibility that the damage took place in a relatively short period of time at around 11.45 am on 14 January. The alternative was that the damage had taken place over a continuous period. The trial judge had fixed a time when the damage started though did not choose between two possibilities as to when it ended (at [84]).

The trial judge accepted general medical evidence that the longer the delay between deterioration and intervention by the neurosurgeon, the greater the likely damage. However, according to Heydon J, this did not overcome two problems:

- it was not until the time at which the damage started, that is, at about 11.45 am [on 14 January] that there was any indication of the need to insert a drain; and

[19] As Brennan J indicated in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 359.

[20] *Hill v Van Erp* (1997) 188 CLR 159; *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

[21] *Tabet v Gett* (2010) 240 CLR 537 at [26], Gummow ACJ quoting *Gett v Tabet* (2009) 254 ALR 504 at 586.

- it had not been shown that, in the appellant's circumstances, two hours would have made any difference to the outcome.

With respect, the first finding does not give adequate significance to the discovery by the nursing staff of a fixed dilated pupil one day earlier. This is usually taken as indicating the need for emergency treatment to reduce raised intracranial pressure. This would especially be the case where the patient already has a presumptive diagnosis of meningitis or encephalitis which carry a high risk of raised intracranial pressure. In any event, Heydon J noted that one of the medical officers examined, Mr Klug, gave evidence on the effects of steroids in a general sense. However, he did not give evidence as to how these general conclusions applied to the circumstances of the appellant (at [93]). All of the factors involved "supported the view that it was 'very speculative' as to whether steroid treatment would have created chance of avoiding the incident on the 14 January 1991" (at [94]). Heydon J concluded (at [97]-[98]) that, in light of the paucity of relevant evidence, the question as to whether the appellant was deprived of a loss of chance of a better outcome had become purely abstract, and one which he therefore was not called upon to decide in this case.

Keifel J, Hayne and Bell JJ and Crennan J: Difference between scientific and legal causation

Keifel J focused on the distinction between the loss or *damage* necessary to found an action in negligence, which is the injury itself and its foreseeable consequences, and *damages*, which are awarded as compensation for each item or aspect of the injury (at [135]).[22] Kiefel J held that mere difficulty in estimating damages should not be permitted to render an award uncertain or impossible (at [136]).[23] Imprecision when assessing loss of chance is acceptable in the context of damages, whether in contract or torts.[24] Such imprecision, however, is not appropriate in proving loss of chance when that loss is being considered as a type of harm or form of damage (at [39], Gummow ACJ).

On the issue of causation, Keifel J (at [113], with whom Hayne and Bell JJ in their joint judgment and also Crennan J agreed) noted that, once causation is proved to the balance of probabilities, the common law treats what is shown to have occurred as certain.[25] Unlike proof in science or philosophy, the purpose of proof at law is to apportion legal responsibility (at [113]).[26] When loss or damage, eg, is proved to have been caused by a defendant's act or omission, a plaintiff recovers the entire loss (the "all or nothing" rule). Keifel J noted (at [136]) that, with respect to causation, the general standard of proof (the balance of probabilities) is to be maintained.[27] The onus to prove that the defendant caused the plaintiff's loss of chance remains with the plaintiff. To permit recovery for the deprivation of the possibility, but not the probability, of a better outcome would be to significantly alter the existing law as to proof of causation of injury, in particular by redefining the concept of "harm".[28]

Keifel J concluded (at [151]) that "the argument that there should be compensation where breach of duty is proved simply denies proof of damage as necessary to an action in negligence". To do so would "divert attention from the proper connection between fault and damage. It is artificial and breaks the causal link" (at [142]).[29] Her Honour was not persuaded that "denial of recovery in cases of this kind would fail to deter medical negligence or ensure that patients receive an appropriate standard of care" (at [151]).

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[22] *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 527.

[23] *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83, Mason CJ and Dawson J citing *Fink v Fink* (1946) 74 CLR 127 at 143.

[24] *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, Gummow ACJ quoting this case at [39].

[25] *Mallett v McMonagle* [1970] AC 166 at 176 (Lord Diplock); *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 642-643 (Deane, Gaudron and McHugh JJ).

[26] Citing *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 509 (Mason CJ).

[27] Citing *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355 (Mason CJ, Dawson, Toohey and Gaudron JJ), at 367 (Brennan J).

[28] Citing *Gett v Tabet* (2009) 254 ALR 504 at 586.

[29] Quoting Gonthier J in *Laferrière v Lawson* [1991] 1 SCR 541 at 591.

FUTURE POTENTIAL FOR LOSS OF CHANCE

Although the High Court dismissed the appellant's appeal, it did not exclude loss of chance as forming the substance of a claim in medical negligence in the future.[30] There may, it held, be "other cases in which it might be said that, as a result of medical negligence, a patient has lost 'the chance of a better medical outcome' [which] differ from the present case in significant respects".[31] As an example of such a case, their Honours referred to reductions in life expectancy and to decisions in other jurisdictions.

In *Matsuyama v Brinbaum* 890 NE (2d) 819 (2008), the Supreme Judicial Court of Massachusetts, on the motion of the patient's widow, awarded proportional damages against an oncologist for failure to promptly diagnose gastric cancer by biopsy where the patient's chance of 10 year survival was 37.5% before the negligence occurred. The cancer metastasised into an inoperable phase, resulting in his premature death. Marshal CJ reasoned that to apply the "all or nothing" rule (ie the "but for" test) in these circumstances would be unfair or would disadvantage the plaintiff because

> if a plaintiff has 51% chance of survival, and the negligent misdiagnosis or treatment caused that chance to drop to zero, the estate is awarded full wrongful death damages. On the other hand, if a patient had a 49% chance of survival, and the negligent misdiagnosis or treatment caused that chance to drop to zero, the plaintiff receives nothing. So long as the patient's chance of survival before the physician's negligence was less than even, it is logically impossible for her to show that the physician's negligence was the but-for cause of her death, so she can recover nothing … the all or nothing rule provides a "blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence".[32]

Keifel J explained that the "proportional damages" awarded in *Matsuyama* referred to the damages, expressed as a proportion of the total damages, which might have been awarded for Mr Matsuyama's wrongful death, but for which the defendant could not be held liable (at [138]). The plaintiff was not required to prove the defendant's omissions caused any harm in order that these damages be awarded. The jury, in other words, did not identify the loss of chance as damage in the sense of a specific harm (at [139]).

Gummow ACJ and Keifel J held that in *Matsuyama v Birnbaum* the court discussed the scientific evidence available in medical malpractice suits, saying that this evidentiary reliability was "key" to its recognition of loss of a chance and that successful loss of a chance claims required such evidence. Marshal CJ reasoned (at 833):

> A statistical survival rate cannot conclusively determine whether a particular patient will survive a medical condition. But survival rates are not random guesses. They are estimates based on data obtained and analyzed scientifically and accepted by the relevant medical community as part of the repertoire of diagnosis and treatment, as applied to the specific facts of the plaintiff's case.

Significantly, the court stated:

> Where credible evidence establishes that the plaintiff's or decedent's probability of survival is 49%, that conclusion is no more speculative than a conclusion, based on similarly credible evidence, that the probability of survival is 51%.

In *Matsuyama*, the court found it appropriate to recognise loss of chance on the basis that medical science had developed to a point that, "at least for some conditions, expert evidence could replace speculation" (at 834).

As Spigelman CJ noted in *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at [60]:

> Epidemiologists do make judgments about whether a statistical association represents a cause-effect relationship. However, those judgments focus on what is sometimes called in the epidemiological

[30] See Walsh G and Walsh A, "Tabet v Gett: The End of Loss of Chance Actions in Australia?" (2010) 18 JLM 50.

[31] *Tabet v Gett* (2010) 240 CLR 537 at [27] (Gummow ACJ), at [69] (Hayne and Bell JJ), at [129] (Kiefel J).

[32] Citing *Herskovits v Group Health Coop of Puget Sound* 99 Wash 2d 609 at 614; 664 P 2d 474 (1983).

> literature "general causation": Whether or not the particular factor is capable of causing the disease. Epidemiologists are not concerned with "specific causation": Did the particular factor cause the disease in the individual case?

And at [79]:

> [E]vidence of possibility expressed in opinion form and evidence of possibility from epidemiological research or other statistical indicators, is admissible and must be weighed in the balance with other factors, when determining whether or not, on the balance of probabilities, an inference of causation in a specific case could or should be drawn.

The High Court cited cases based on life expectancy as an area in which loss of chance might develop in the future. One reason for this may be that in such cases causation is shown on the basis of hard rather than speculative data.

The House of Lords decision in *Gregg v Scott* [2005] 2 AC 176 was also relevant. Mr Gregg presented to his doctor with symptoms and clinical signs suggestive of non-Hodgkin's lymphoma. However, his doctor failed to send him for a biopsy, so the diagnosis of cancer and initiation of appropriate treatment was delayed for 12 months by which time the cancer had spread. Expert evidence considered disease-free survival for 10 years as a "cure" for this form of cancer. This meant that, from the point of diagnosis, Mr Gregg would need to remain disease free until at least 2008. There was agreement that had Mr Gregg been promptly diagnosed and treated, his chance of "cure" would have been 42%. Due to the later diagnosis, this chance was reduced to 25%.

Despite these predictions, the reality was that, against the odds, Mr Gregg had been in remission since 1998 and there was no sign of recurrence of the disease in 2001, nor as the case proceeded to the House of Lords. His sole complaint, therefore, was that his prospect of cure was reduced. Complicating the issue was the fact that the chance had yet to run its course. The obvious question arising was whether the damage, as a loss of chance, had actually been sustained.[33] Lord Phillips, one of the majority, said that it would be unsatisfactory to award damages for the reduction in the chance of a cure when the long-term result of the treatment remained uncertain. In fact, to do so would threaten the coherence of the common law.[34]

CONCLUSION

The orthodox view among academic commentators has been that until injury or economic loss is proven to have occurred, no tort is committed and no damages are payable.[35] This creates conceptual difficulties when thinking through how "loss of chance" (particularly when the probability is less than 50%) could constitute a type of harm in the tortious arena. Loss of chance has been accepted as founding recovery on the basis of economic loss in contract and in some cases in negligence.[36]

In *Tabet v Gett* the High Court affirmed the view that loss of a chance had a restricted place in the law of negligence in Australia. The High Court refrained from reformulating the law of torts to "permit recovery for physical injury not shown to be caused or contributed to by a negligent party, but which negligence has deprived the victim of the possibility (but not the probability) of a better outcome".[37] Significantly, the court did not exclude loss of chance forming the substance of a claim in the future.[38]

So what are the areas where "loss of a chance" may result in successful claims in medical negligence? First, these would be situations where good statistical evidence is available that treatments

[33] *Tabet v Gett* (2010) 240 CLR 537 at [16] (Gummow ACJ).

[34] *Gregg v Scott* [2005] 2 AC 176 at 221, cited in *Tabet v Gett* (2010) 240 CLR 537 at [18] (Gummow ACJ).

[35] Luntz H and Hambly D (eds), *Torts: Cases and Commentary* (5th ed, Butterworths, 2002) p 335.

[36] *Hill v Van Erp* (1997) 188 CLR 159; *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

[37] *Tabet v Gett* (2010) 240 CLR 537 at [25], Gummow ACJ quoting *Gett v Tabet* (2009) 254 ALR 504 at 586.

[38] *Tabet v Gett* (2010) 240 CLR 537 at [27] (Gummow ACJ), at [69] (Hayne and Bell JJ), at [129] (Kiefel J).

forgone would have made a difference (that is, probability over 50%).[39] Secondly, tortious "loss of a chance" claims should play an important role in regulating situations where patients have been denied prompt information about a diagnosis, or treatment options, or adverse events they have suffered, even where the evidence of the difference that would have made is difficult to calculate. Loss of a chance claims, however, should not be allowed to distort informed consent actions by establishing professional practice standards requiring best possible rather than reasonably appropriate care.

On balance, it appears any further development of loss of chance as a gist of medical negligence in Australia will be confined to cases in which a plaintiff's life expectancy has been significantly reduced and where the chance of survival if the alternative treatment had been made available can be established as over 50%. In the meantime, because of the absence of a no-fault system of compensation for such injuries, Australia's legal system must face the injustice of the significant day-to-day care needs of patients being borne by their relatives and the taxpayer-funded public hospital system. Until such a no-fault compensation system is introduced, courts should be responsive to the injustice implicit in the artificialities forced on plaintiffs by the current restrictive medical negligence system. It is not fair that medical indemnity insurers being paid large amounts by both practitioners and governments and being protected for claims by that system should be insulated both by State legislation and the High Court from making a reasonable contribution to the considerable needs of patients such as the appellant in this marginally defensible case.

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[39] Dubrow D, "Loss of a Chance in Medical Negligence" (Sept 2010) LIJ 37.